Office - Supreme Court, U.S.
FILED
FEB 21 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-498

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL BANK OF COMMERCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

WILLIAM S. ESTABROOK
JOHN A. DUDECK, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Section 6331(a) of the Internal Revenue Code authorizes the IRS to collect unpaid taxes by levy upon "all property and rights to property * * * belonging to" a delinquent taxpayer. Section 6332(a) in turn requires any custodian of such "property" or "rights to property" to surrender it upon demand of the IRS. The question presented is whether, where a delinquent taxpayer has an unrestricted right under his contract with a bank and state banking law to withdraw without notice to his co-depositors the full amount on deposit in a joint checking or savings account, the IRS has a corresponding right to levy on the account in satisfaction of that taxpayer's tax liability, or whether (as the court of appeals held) the IRS must negate or quantify the potential claims of all the delinquent taxpayer's co-depositors as a precondition to a valid administrative levy.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-498

UNITED STATES OF AMERICA, PETITIONER

v.

NATIONAL BANK OF COMMERCE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 726 F.2d 1292. The opinion of the district court (Pet. App. 18a-29a) is reported at 554 F. Supp. 110.

JURISDICTION

The judgment of the court of appeals (Pet. App. 30a) was entered on January 31, 1984. A timely petition for rehearing was denied on April 30, 1984 (Pet. App. 31a). On July 21, 1984, Justice Blackmun extended the time within which to petition for a writ of certiorari to and including September 27, 1984. The petition was filed on that date and was granted

on January 7, 1985 (J.A. 27). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 6321, 6331, 6332, 7403 and 7426 of the Internal Revenue Code of 1954 (26 U.S.C.) and of Ark. Stat. Ann. §§ 67-521, 67-552 (1980) are set out in a statutory appendix (Pet. App. 32a-38a)

STATEMENT

1. Roy Reeves owes $857 in federal income taxes for 1977, based upon an assessment made against him on December 10, 1979 (Pet. App. 2a). He has a checking account and a savings account at the National Bank of Commerce, a banking corporation doing business in Pine Bluff, Arkansas (*id.* at 1a-3a). Both accounts are held in the names of "Roy Reeves or Ruby Reeves or Neva R. Reeves" (*id.* at 3a; J.A. 9, 14-15).[1] Each of the three, Roy, Ruby, and Neva, is authorized to withdraw money up to the full amount of the outstanding balance in each account (Pet. App. 3a; J.A. 9, 12). It is not known which of the three co-depositors owned the funds before the funds were deposited in the accounts, or in what proportion (Pet. App. 3a; J.A. 12, 22). It was stipulated below that no evidence would be submitted as to the co-depositors' respective claims, inter sese, to the funds (Pet. App. 3a; J.A. 17).

Section 6331(a) of the Code[2] provides that the IRS may collect the taxes of a delinquent taxpayer "by

[1] Although the record does not reveal how the three co-depositors are related to one another, we understand that Neva is Roy's wife and that Ruby is his mother.

[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

levy upon all property and rights to property * * * belonging to such person." Section 6332(a) in turn provides that anyone "in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made" shall surrender such property or rights upon demand of the IRS. Pursuant to these Sections, the Commissioner, in an effort to collect Roy's unpaid taxes, served a notice of levy against the bank with respect to the two accounts described above. On the date the notice of levy was served—June 13, 1980—the balance in the checking account was $322 and the balance in the savings account was $1,242 (Pet. App. 3a; J.A. 11-12). The IRS demanded that the bank pay over to it sufficient monies from the accounts to satisfy Roy's $857 tax liability (J.A. 9, 12).

2. The bank refused to comply with the levy, contending that it did not know how much of the money on deposit belonged to Roy, as opposed to Ruby or Neva (Pet. App. 1a; J.A. 19). The government then brought this action against the bank in the United States District Court for the Eastern District of Arkansas, pursuant to Code Section 6332(c)(1). That Section provides that "[a]ny person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the [IRS], shall be liable in his own person and estate" up to the value of the property or rights not surrendered or the amount of the tax due, whichever is less. The government accordingly sought judgment against the bank in the amount of $857 (J.A. 7, 15).[3]

[3] In its original complaint (J.A. 7), the government also sought to collect a penalty from the bank in the amount of $428 under Section 6332(c)(2). That Section provides that, where a person's refusal to surrender property in response

The case was submitted to the district court on cross-motions for summary judgment and on the bank's motion to dismiss the complaint (Pet. App. 18a; J.A. 18-24).[4] The district court granted the bank's motion to dismiss, concluding (Pet. App. 23a) that due process mandates "something more" than the Code's levy procedures provide. In the court's view, "the minimum due process required in distraint actions against joint bank accounts" obligates the IRS to identify the delinquent taxpayer's co-depositors and provide them with notice and an opportunity to be heard (Pet. App. 24a-25a). The district court then outlined in detail the procedures it believed the Constitution requires the IRS to follow when levying on joint bank accounts.[5]

3. The court of appeals affirmed (Pet. App. 1a-17a).[6] Although it expressed no opinion on the constitutional analysis advanced by the district court (*id.* at 2a, 17a), it reached essentially the same result as a matter of statutory construction. In the court of appeals' view, the IRS, when levying on a joint bank account, must bear the burden of proving "the actual value of the delinquent taxpayer's interest in [the] jointly owned property" (*id.* at 2a). Since "the rights of the various parties" to the funds at issue here had not yet been determined (*id.* at

to a levy is "without reasonable cause," he shall be liable, not only for the amount recoverable under Section 6332(c)(1), but also for a penalty "equal to 50 percent of [that] amount." The government eventually agreed to waive any claim to the Section 6332(c)(2) penalty in this case (J.A. 13), and the complaint was amended accordingly (*id.* at 15). Thus, no question concerning the Section 6332(c)(2) penalty is presented here.

[4] The bank's motion to dismiss was based on the theory that Roy's co-depositors were "indispensable parties" in the action seeking to hold it personally liable for refusing to honor the levy; the government's failure to join Ruby and Neva, the bank argued, thus mandated dismissal under Fed. R. Civ. P. 19(b) (Pet. App. 19a; J.A. 18). The bank suggested that joinder of Roy's co-depositors was required by analogy with Code Section 7403(b), which provides that, in a plenary action to foreclose an IRS tax lien, "[a]ll persons having liens upon or claiming any interest in the property * * * shall be made parties" (J.A. 23; Br. in Support of Motion to Dismiss 1-2). Alternatively, the bank suggested that joinder of Ruby and Neva was mandated by the provisions of Arkansas garnishment law, which the State's courts had interpreted to require that co-depositors be joined in an action of garnishment against a bank account (J.A. 23-24; Br. in Support of Motion to Dismiss 2-4). The district court did not specifically address the bank's Rule 19(b) argument.

[5] The district court held that a bank, upon receiving a notice of levy, should freeze the assets in the account and provide the IRS with the names of all co-depositors (Pet. App. 24a-25a). The IRS would then be required to notify the co-depositors and give them a reasonable time period "in which to respond both to the government and the bank by affidavit or other appropriate means, specifically setting out any ownership interest [claimed] in the joint account" and the ground of their claim (*id.* at 25a). If the bank, on the basis of the affidavits, "believe[d] that a genuine dispute exist[ed] as to the legality of any ownership claim" made by the co-depositors, "it [might] refuse to surrender any portion of the funds so claimed" (*id.* at 29a). The IRS would then be forced to bring suit to enforce the levy, at which point "due process would require that the government * * * name the co-depositors as co-defendants with the bank" (*id.* at 25a).

[6] The court of appeals recited that the district court had "held for the bank on summary judgment" (Pet. App. 2a) and based its affirmance on a conclusion that "the summary judgment entered for the bank was proper" (*id.* at 17a). The district court, however, had not entered summary judgment for the bank, but rather had granted the bank's motion to dismiss the complaint (*id.* at 29a).

17a), the court concluded that the government had not shown the bank to be in possession of "property [or] rights to property * * * belonging to" Roy, as Section 6331(a) requires.

The Eighth Circuit acknowledged that, under Arkansas banking law, "Roy could have withdrawn any amount he wished from the account[s] and used it to pay his debts, including federal income taxes, and his co-owners would have had no lawful complaint against the bank" (Pet. App. 6a). The court also found some force in the argument that "the very right, conferred by statute, to make withdrawals is a 'right to property' belonging to Roy, on which the government could levy" (*id.* at 7a). The court nevertheless refused to accept the government's contention that it "st[ood] in Roy's shoes and could do anything Roy could do," pointing out that, "at least as to ordinary creditors, [that was] not the law of Arkansas." Under Arkansas garnishment law, the court noted, a creditor of a bank co-depositor is not "subrogated to that co-owner's power to withdraw the entire account." Rather, a creditor in an Arkansas garnishment proceeding "must join both co-owners as defendants" and permit them to "show by parol or otherwise the extent of [their] interest in the account." *Ibid.*[7] The court of appeals concluded that a similar rule should apply in administrative levy proceedings under the Internal Revenue Code, and accordingly held that the government could not prevail

[7] The court observed that "[t]he rights of [bank co-depositors] *inter sese* are not determined by the cited Arkansas [banking] statutes," but rather "depend on the intention of whoever deposited the money, or on whatever agreement, if any, might have been made among the co-owners" (Pet. App. 6a-7a).

without negating or quantifying the claims that Ruby or Neva might have to the funds in question.

In upholding the bank's refusal to honor the levy, the court of appeals also expressed the belief that IRS administrative levies are "not normally intended for use as against property in which third parties have an interest" or "against property bearing on its face the names of third parties" (Pet. App. 17a). The government's proper remedy in such situations, the court of appeals said, is to "bring[] suit to foreclose its lien under Section 7403, joining as defendants the * * * co-owners of the account" (*ibid*). The court appeared to agree with the government's contention that "a number of cases—probably the majority—either expressly or by implication hold that a person holding property in which both the taxpayer and someone else have an interest, must honor a Section 6331 levy" (Pet. App. 11a). But the court rejected the reasoning of these cases, concluding that the possibility that Ruby and Neva might have claims to the funds justified the bank in refusing to honor the levy, and thus prevented the government from maintaining an action to impose personal liability upon it.

SUMMARY OF ARGUMENT

1. The question in this case is whether Roy's joint bank accounts were "property [or] rights to property belonging to" him and thus were subject to IRS levy in satisfaction of his taxes. In answering this question, state law determines the nature and extent of Roy's rights in the accounts. Federal law determines whether Roy's rights, as thus defined, constitute "property" or "rights to property" as those terms are used in the applicable sections of the Internal Revenue Code.

In *United States* v. *Bess*, 357 U.S. 51 (1958), this Court squarely held that a taxpayer who has the contractual right to compel payment of a sum to him in accordance with the contract's terms has "property [or] rights to property" within the meaning of the Code's lien and levy provisions. The Court in *Bess* made clear that the right to enjoy possession of property—that is, the ownership of a power that may be exercised to create a beneficial interest in oneself—is the essence of a "right to property" for federal tax collection purposes. This principle is reflected in numerous decisions involving taxpayers' interests in property as diverse as bank accounts, trusts, commercial contracts, and insurance policies.

In the present case, Roy possessed the unrestricted right under state law and his contract with the bank to compel it to pay him the full outstanding balance in each account. He had the right to make withdrawals without notice to his co-depositors, and to withdraw funds for any reason he chose, including satisfaction of his federal taxes. This absolute right to compel payment and thus to enjoy possession of the funds was "property" or a "right to property" belonging to Roy within the meaning of Sections 6331 and 6332. Under the plain language of those Sections, therefore, the IRS had power to levy on the accounts to satisfy Roy's tax liability, and the bank is personally liable for its failure to honor the levy.

This straightforward statutory answer is strongly supported by common sense. It is hornbook tax law that the IRS "steps into the taxpayer's shoes" when levying on his property. The IRS, in other words, acquires whatever rights the taxpayer himself possesses. Since Roy had the right to withdraw money from the accounts and use it to pay his taxes, the IRS

by its levy sought to do exactly what he could have done of his own volition. It is inconceivable that Congress intended to prohibit the IRS from levying on property which, like the bank accounts here, is freely accessible to the delinquent taxpayer.

2. In rejecting this common-sense approach, the court of appeals relied largely on state garnishment law, under which Roy's creditors would not be subrogated to his right to withdraw and spend the funds and thus would not "stand in his shoes." It has been established for decades, however, that state creditors' rights laws do not bind the IRS in its efforts to collect taxes. Indeed, the restrictions imposed by state law on ordinary creditors' rights have no logical bearing on the question whether a taxpayer's state-defined interests are "property [or] rights to property belonging to" him within the meaning of the Internal Revenue Code. By remitting the IRS to only those remedies that an ordinary creditor would have under state law, the court of appeals has effectively deprived the Code's administrative levy provisions of any force in this context.

3. The court of appeals suggested that the bank could refuse to honor the levy because of the possibility that Roy's co-depositors might have competing claims to some or all of the funds on deposit. It has long been established, however, that potential disputes as to ownership are not a defense to a suit to enforce an IRS levy. Rather, Congress has provided that the custodian must surrender the property to the IRS at once, and that ownership disputes (if any) will be resolved in a post-seizure administrative or judicial proceeding initiated by the third-party claimant. This Court has repeatedly sustained the constitutionality of this post-seizure hearing proce-

dure, reasoning that "[p]roperty rights must yield provisionally to governmental need" (*Phillips* v. *Commissioner*, 283 U.S. 589, 595 (1931)). In holding that the validity of such third-party claims must be finally resolved—indeed, that the mere possibility of their arising must be anticipated and eliminated—before compliance with a levy can be required, the court of appeals ignored the statutory scheme that Congress established.

4. The court of appeals' errors appear with striking clarity when one considers the practical effect of its holding. Administrative levies are the Commissioner's primary tool for the collection of delinquent taxes. This is so because levy, as compared with seizure of physical assets and the Commissioner's various judicial remedies, is "quick and relatively inexpensive" (*United States* v. *Rodgers*, 461 U.S. 677, 699 (1983)). The IRS serves hundreds of thousands of levies on joint bank accounts every year. Banks have routinely honored such levies, co-depositors have rarely complained, and litigation has seldom resulted.

On the court of appeals' theory, however, a bank can refuse with impunity to honor a levy on a joint account unless the IRS proves to the bank's satisfaction the proportionate "ownership interests" of the various co-depositors. This would make administrative levies so burdensome as to be impractical whenever a delinquent taxpayer's property is titled in more than one name. Differentiating joint depositors' respective ownership interests "involves one of the murkiest areas of property law" (Plumb, *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 Yale L.J. 605, 629 (1968)). Who "owns" the funds in a joint checking account may

depend, for example, on who deposited the money, who wrote the checks, what the checks were used to pay for, and what sort of understanding (tacit or explicit) the parties might have had among themselves. Quite obviously, the IRS would not find it easy to bear the burden of proving all this in an administrative levy proceeding.

Faced with the virtual impossibility of resolving such ownership disputes administratively, the government would have no practical alternative but to follow the Eighth Circuit's suggestion (Pet. App. 17a) and bring suits under Code Section 7403 to foreclose its tax liens, joining all co-depositors as defendants. Since the IRS serves levies on several hundred thousand joint bank accounts every year, however, such suits would place an intolerable burden on the government and on the courts. In effect, the Commissioner's power of administrative levy could be nullified simply by the taxpayer's unilateral act of adding another person's name to his property, a result that Congress cannot possibly have intended.

ARGUMENT

SINCE THE DELINQUENT TAXPAYER HAD THE UNRESTRICTED RIGHT UNDER STATE LAW TO WITHDRAW THE FULL AMOUNT ON DEPOSIT IN HIS JOINT CHECKING AND SAVINGS ACCOUNTS, THE IRS HAD A CORRESPONDING RIGHT TO LEVY ON THOSE ACCOUNTS IN SATISFACTION OF HIS TAX LIABILITY, AND THE COURT OF APPEALS THUS ERRED IN DECLINING TO HOLD THE BANK PERSONALLY LIABLE FOR ITS REFUSAL TO HONOR THE LEVY

A. The Internal Revenue Code Grants the Commissioner Broad Power to Levy on All "Property and Rights to Property" Belonging to a Delinquent Taxpayer

1. Section 6321 of the Code provides that, "[i]f any person liable to pay any tax neglects or refuses to pay the same" after assessment, notice and demand, the amount of the unpaid taxes "shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." The lien generally arises when the assessment is made, and it continues until the taxpayer's liability "is satisfied or becomes unenforceable by reason of lapse of time" (I.R.C. § 6322). In impressing a lien upon "all property and rights to property" belonging to a tax delinquent, Congress cast its net broadly to reach every interest in property that a taxpayer might have—including interests as diverse as options, contingent remainders, business licenses, unliquidated choses in action, and after-acquired property. See 4 Bittker, *Federal Taxation of Income, Estates and Gifts* ¶ 111.5.4, at 111-100 (1981). Indeed, as this Court has noted, "[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes" (*Glass City Bank* v. *United States*, 326 U.S. 265, 267 (1945)).

A federal tax lien, however, is not self-executing. The IRS must take affirmative action to enforce collection of unpaid taxes, and the Code affords it two principal tools for that purpose. One of these tools is a lien-foreclosure suit. Section 7403(a) authorizes the Attorney General, at the request of the Secretary of the Treasury, to institute a civil action in federal district court to enforce a tax lien and "to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax." All persons "having liens upon or claiming any interest in the property" must be joined as parties (I.R.C. § 7403(b)). A lien-foreclosure suit is a plenary action in which the court "adjudicate[s] all matters involved" and "finally determines the merits of all claims to and liens upon the property" (I.R.C. § 7403(c)). The court may decree sale of the property and distribution of the proceeds "according to the findings of the court in respect to the interests of the parties and of the United States" (*ibid.*). See generally *United States* v. *Rodgers*, 461 U.S. 677, 680-682 (1983); 4 Bittker, *supra*, ¶ 111.5.6, at 111-112.

Alternatively, the IRS may collect unpaid taxes by administrative levy, a procedure that, unlike the procedure described above, typically "does not require any judicial intervention" (*Rodgers*, 461 U.S. at 682). Section 6331(a) provides that, "[i]f any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax * * * by levy upon all property and rights to property * * * belonging to such person or on which

there is a [federal tax] lien." Section 6331(b) defines "levy" to include "the power of distraint and seizure by any means."

Where the taxpayer's property is held by a third party, the IRS typically serves a "notice of levy" upon the custodian pursuant to Section 6332(a). That Section provides that

> any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

The notice of levy gives the IRS the right to all property levied upon, whether tangible or intangible (*United States* v. *Eiland*, 223 F.2d 118, 121 (4th Cir. 1955)), and creates a custodial relationship between the person holding the property and the IRS, so that the property comes into the constructive possession of the government (*Phelps* v. *United States*, 421 U.S. 330, 334 (1975)). If the custodian honors the levy, he is "discharged from any obligation or liability to the delinquent taxpayer with respect to [the] property or rights to property" thus surrendered (I.R.C. § 6332(d)).

If the custodian refuses to honor a proper levy, on the other hand, he incurs liability to the government for his refusal. Section 6332(c)(1) provides that

> [a]ny person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum * * *.

Such personal liability is necessary to enforce IRS levies. Without it, people could ignore levies with impunity and the government's ability to collect taxes would be seriously impaired.[8]

Administrative levy "is a summary, non-judicial process, a method of self-help authorized by statute which provides the Commissioner with a prompt and convenient method for satisfying delinquent tax claims." *United States* v. *Sullivan*, 333 F.2d 100, 116 (3d Cir. 1964). The levy is "a provisional remedy."

---

[8] Section 6332(c)(1) has its roots in Section 1114(e) of the Revenue Act of 1926, ch. 27, 44 Stat. 117. Congress explained that earlier enactment (S. Rep. 52, 69th Cong., 1st Sess. 38 (1926)) as follows:

> The existing law permits distraint upon personal property of a delinquent taxpayer even though in possession of another person. The committee amendment specifically makes it the duty of the possessor to surrender the property upon which a levy is made, and imposes upon him * * * a civil liability, if he fails to do so, equal to the value of the property, but not exceeding the amount of tax, a liability similar to that of an executor who pays debts before he pays a debt due to the United States.

We have found no other legislative history discussing this provision. In order to make clear that the government is not entitled to recover against *both* the custodian *and* the tax delinquent, Congress amended Section 6332(c)(1) in 1966 to provide explicitly that "[a]ny amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made." Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 104(b)(4), 80 Stat. 1136.

4 Bittker, *supra*, ¶ 111.5.5, at 111-108. Unlike a lien-foreclosure suit, it does not determine "whether the government's rights to the seized property are superior to those of other claimants," but it does protect the government "against diversion, loss, or concealment of the property" while such claims are being resolved (*id.* at 111-108, 111-111). The "underlying principle" justifying administrative levies is "the need of the government promptly to secure its revenues." *Phillips* v. *Commissioner*, 283 U.S. 589, 596 (1931). Indeed, "the existence of the levy power is an essential part of our self-assessment tax system," for it "enhances voluntary compliance in the collection of taxes that this Court has described as 'the life-blood of government.'" *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 350 (1977) (quoting *Bull* v. *United States*, 295 U.S. 247, 259 (1935)). Among the chief advantages of administrative levy "is that it is quick and relatively inexpensive" (*Rodgers*, 461 U.S. at 699). Indeed, "[i]n terms of cost, time, and energy, [it] normally constitutes the least expensive method by which the government may collect an assessed tax." W. Plumb, *Federal Tax Liens* 256 (3d ed. 1972). The constitutionality of the levy procedure "has long been settled." *Phillips*, 283 U.S. at 595. Accord, *e.g.*, *G.M. Leasing Corp.*, 429 U.S. at 352 n.18; *Fuentes* v. *Shevin*, 407 U.S. 67, 91-92 & n.24 (1972).

2. In the present case, the IRS decided to pursue the administrative route and to collect Roy's unpaid taxes by levying upon his bank accounts. It is well established that bank accounts are a species of property "subject to levy" within the meaning of Section 6332(a). Levies on bank accounts have been permitted since 1924 (Revenue Act of 1924, ch. 234,

§ 1016, 43 Stat. 343), and the Treasury Regulations explicitly state that "[l]evy may be made by serving a notice of levy on any person in possession of, or obligated with respect to, property or rights to property * * * including * * * bank accounts" (Treas. Reg. § 301.6331-1(a)(1)).[9] Although the Code specifies certain types of property that are exempt from IRS levy,[10] none of those exemptions covers bank accounts.

The courts have uniformly held, in accordance with the plain language of Sections 6331 and 6332, that a bank (or other person) served with an IRS notice

---

[9] Technically, of course, a bank account establishes a debtor-creditor relationship between the bank and its depositor. Section 6332(a) takes care of this technicality by providing that the IRS may serve a notice of levy upon anyone "in possession of (*or obligated with respect to*) property or rights to property," and by requiring that such person "surrender such property (*or discharge such obligation*) to the Secretary."

[10] Section 6334 enumerates nine classes of property that, while not exempt from the incidence of the federal tax lien, are exempt from administrative levy. Such items include wearing apparel and school books, furniture and personal effects, tools of a trade or profession, unemployment benefits, undelivered mail, certain pension and annuity payments, workmen's compensation, judgments in support of minor children, and a minimum amount of wages or salary (I.R.C. § 6334(a)(1) through (9)). These exemptions are exclusive. Section 6334(c) provides that, "[n]otwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by" Section 6334(a). And Congress in enacting that Section made clear that "[p]rovisions of State law cannot grant an exemption from levy." S. Rep. 1622, 83d Cong., 2d Sess. 578 (1954). Accord, *United States* v. *Mitchell*, 403 U.S. 190, 205 (1971).

of levy "has only two defenses for a failure to comply with the demand." *United States* v. *Sterling National Bank*, 494 F.2d 919, 921 (2d Cir. 1974) (citing cases). One defense is that the person is neither "in possession of" nor "obligated with respect to" property or rights to property belonging to the tax delinquent. The other defense is that the taxpayer's property is "subject to a prior judicial attachment or execution." *Id.* at 921. Accord, *e.g.*, *Bank of Nevada* v. *United States*, 251 F.2d 820, 824 (9th Cir. 1957), cert. denied, 356 U.S. 938 (1958); *Commonwealth Bank* v. *United States*, 115 F.2d 327, 330-331 (6th Cir. 1940); M. Saltzman, *IRS Practice and Procedure* ¶ 14.16, at 14-80 (1981) (citing cases).

The bank in this case was obviously "obligated with respect to" the bank accounts in question because, as it concedes (Br. in Opp. 12), it was "obligated to honor any withdrawal requests Roy might make." And the bank has never suggested that the accounts were subject to a prior judicial attachment or execution. The controlling question, therefore, is whether those accounts constituted "property [or] rights to property * * * belonging to" Roy (I.R.C. § 6331(a)).

B. The Delinquent Taxpayer's Unrestricted Right to Compel Payment of the Account Balances to Him Constituted "Property [or] Rights to Property" Within the Meaning of Section 6331(a)

1. In deciding whether an entitlement amounts to "property [or] rights to property" within the meaning of Sections 6321 and 6331, " 'state law controls in determining the nature of the legal interest which the taxpayer ha[s] in the property.' " *Aquilino* v. *United States*, 363 U.S. 509, 513 (1960) (quoting

Morgan v. *Commissioner*, 309 U.S. 78, 82 (1940)). Accord, *e.g.*, *Rodgers*, 461 U.S. at 683. This principle follows from the fact that the Internal Revenue Code "creates no property rights, but merely attaches consequences, federally defined, to rights created under state law." *United States* v. *Bess*, 357 U.S. 51, 55 (1958). But while the existence of rights or interests is a question of state law, "[t]he classification of [those] interests is a federal question." *Fidelity & Deposit Co.* v. *New York City Housing Authority*, 241 F.2d 142, 144 (2d Cir. 1957). The levy and lien provisions of the Code, in other words, "require the courts to determine for federal purposes whether [the] state-created interests are 'property' or 'rights to property' " as those words are used in Sections 6321 and 6331. *Fidelity & Deposit Co.*, 241 F.2d at 144. Accord, *e.g.*, *J.A. Wynne Co.* v. *R. D. Phillips Constr. Co.*, 641 F.2d 205, 208 (5th Cir. 1981); *Randall* v. *H. Nakashima & Co.*, 542 F.2d 270, 272-273 (5th Cir. 1976); *United States* v. *Citizens & Southern National Bank*, 538 F.2d 1101, 1105 (5th Cir. 1976), cert. denied, 430 U.S. 945 (1977); W. Plumb, *Federal Tax Liens*, *supra*, at 27; M. Saltzman, *supra*, ¶ 14.08, at 14-34; Note, *Property Subject to the Federal Tax Lien*, 77 Harv. L. Rev. 1485, 1486-1487 (1964). "[O]nce it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements of" the Internal Revenue Code, in short, "state law is inoperative" and the tax consequences thenceforth are dictated by federal law (*Bess*, 357 U.S. at 56-57).

The application of these principles is illustrated by this Court's decision in *United States* v. *Bess*, *supra*. The question there was whether a delinquent taxpayer's interests in insurance policies covering his life constituted "property [or] rights to property" to

which a federal tax lien could attach (357 U.S. at 55). After noting that "the rights of the insured are measured by the policy contract as enforced by [relevant] state law," the Court held that the insured did not have " 'property' or 'rights to property' in the [insurance] proceeds, within the meaning of [the predecessor of Section 6321]" (357 U.S. at 55-56). The Court reasoned that the insured "could not enjoy the possession of the proceeds in his lifetime" and that the proceeds were "reducible to possession by another only upon [his] death" (*ibid.*). Contrariwise, the Court held that the insured did have " 'property' or 'rights of property,' within the meaning of [the predecessor of Section 6321], in the cash surrender value" (357 U.S. at 56). The Court reasoned that the insured had "the right under the policy contract to compel the insurer to pay him this sum" and thus possessed "a chose in action * * * which he could have collected from the insurance companies in accordance with the terms of the policies" (357 U.S. at 56 (original quotation marks omitted)). The Court accordingly held that the insured's interest in the cash surrender value was subject to the federal tax lien. The fact that "under state law the insured's property right represented by the cash surrender value [was] not subject to creditors' liens" was, in the Court's analysis, irrelevant (357 U.S. at 56-57).

This Court's decision in *Bess* makes clear that a taxpayer who has the contractual right to compel payment of a sum to him in accordance with the contract's terms has "property [or] rights to property" within the meaning of Section 6331.[11] Indeed, the

[11] Although the question in *Bess* concerned attachment of the federal tax lien (I.R.C. § 6321) rather than exercise of the Commissioner's power of administrative levy (I.R.C. § 6331), the formula set forth in the Code is the same under both Sections. In each case, the IRS may reach all "property and rights to property * * * belonging to" the delinquent taxpayer. See pages 12-15, *supra*. The same principles apply in determining the meaning of the words "property" and "rights to property" as used in each Section. See, *e.g.*, 4 Bittker, *supra*, ¶ 111.5.4, at 111-101.

Eighth Circuit itself has held, on another occasion, that "[t]he unqualified contractual right to receive property is itself a property right subject to seizure by levy." *St. Louis Union Trust Co.* v. *United States*, 617 F.2d 1293, 1302 (1980). And it makes no difference whether the "contract" in question is a trust indenture,[12] an ordinary commercial contract,[13] an insurance policy,[14] or (as here) a bank account. In each case, the determination whether a taxpayer has "property [or] rights to property" within the meaning of Section 6331 depends on whether state law

[12] *E.g.*, *St. Louis Union Trust Co.*, 617 F.2d at 1302 (levy on bank that had "a fixed contractual obligation to pay [trust] income" to taxpayer). See Plumb, *Federal Liens and Priorities—Agenda for the Next Decade II*, 77 Yale L.J. 605, 618-621 (1968) (collecting cases and concluding that IRS levy should be able to "reach during a taxpayer's lifetime any income or corpus (whether in trust or a legal interest) which the taxpayer could reach by the exercise of a power of revocation, appointment or invasion for his own benefit").

[13] *E.g.*, *United Sand & Gravel Contractors, Inc.* v. *United States*, 624 F.2d 733, 737 (5th Cir. 1980) (levy on contractor that was "obligated to deliver" money to taxpayer).

[14] *E.g.*, *Bess*, 357 U.S. at 56-57. In 1966, Congress amended Section 6332, consistently with this Court's decision in *Bess*, to make clear that the IRS can levy on the cash surrender value of a life insurance policy. Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 104(b), 80 Stat. 1135 (currently codified in I.R.C. § 6332(b)). See S. Rep. 1708, 89th Cong., 2d Sess. 17-19 (1966).

gives him a "right to compel payment," that is, endows him with powers of disposition that may "be exercised to create a beneficial interest in * * * himself." Note, *supra*, 77 Harv. L. Rev. at 1488-1489.

2. In the instant case, the question whether Roy had a "right * * * defined by state law" (*Bess*, 357 U.S. at 55) is measured by his contract with the bank, as enforced by relevant Arkansas statutory provisions. See *id.* at 55-56; *United States* v. *Citizens & Southern National Bank*, 538 F.2d at 1105-1107; *United States* v. *Bowery Savings Bank*, 297 F.2d 380, 382-383 (2d Cir. 1961); Rev. Rul. 55-187, 1955-1 C.B. 197. Under Arkansas banking law, Roy possessed the unqualified right to withdraw the full amount on deposit in the joint checking and savings accounts without notice to his co-depositors.[15] The bank for its part was obligated to honor any withdrawal requests Roy might make, again up to the full amount of the accounts.[16] Indeed, the bank stipu-

[15] The relevant Arkansas statutes provide that, if a checking or savings account is opened in the names of two or more persons, whether as joint tenants, tenants by the entirety, tenants in common or otherwise, all monies deposited become the property of such persons as joint tenants, each person having the unrestricted right to withdraw the entire sum. See Ark. Stat. Ann. §§ 67-521, 67-552 (1980) (*reprinted in* Pet. App. 37a-38a). (Effective March 25, 1983—well after the issuance of the notice of levy in the present case—the relevant Arkansas banking statutes were recodified without substantial change. See Pet. App. 4a-5a & n.3.)

[16] The relevant Arkansas statutes provide that "a banking institution shall pay withdrawal requests * * * and otherwise deal in any manner with the account * * * upon the direction of any one (1) of the persons named therein * * * unless one (1) of such persons named therein shall by written instructions delivered to the banking institution designate that the signature of more than one (1) person shall be required". Ark. Stat. Ann. § 67-552(d) (1980). The bank has never suggested that such "written instructions" existed here.

lated that Roy "was authorized to make withdrawals from the * * * accounts" (J.A. 12), and it is beyond dispute that he was authorized to withdraw all of the available funds for whatever reason he chose. The Eighth Circuit thus correctly concluded that, under Arkansas law, "Roy could have withdrawn any amount he wished from the account[s] and used it to pay his debts, including federal income taxes, and his co-owners would have had no lawful complaint against the bank" (Pet. App. 6a).

That conclusion should have brought the court of appeals' analysis swiftly to an end. Here, as in *Bess*, Roy had the absolute right under state law and his contract with the bank "to compel [it] to pay him" the full outstanding balance in the joint checking and savings accounts, and he thus possessed "a chose in action * * * which he could have collected from the [bank] in accordance with the terms of" those accounts (*Bess*, 357 U.S. at 56). That right constituted "property [or] rights to property belonging to" Roy within the meaning of Section 6331(a), for it was a power of disposition that he could have exercised at any time "to create a beneficial interest in * * * himself" (Note, *supra*, 77 Harv. L. Rev. at 1489). The bank, in turn, was "obligated with respect to" Roy's right to property (I.R.C. § 6332(a)), since state law required it to honor any withdrawal requests, up to the full outstanding balance, that Roy might make. The bank thus had no basis for refusing to honor the levy, and the courts below erred in de-

clining to hold it personally liable under Section 6332 (c)(1) in the amount of Roy's $857 unpaid tax liability.

3. The vast majority of the courts that have considered the question have held, consistently with the view we urge here, that a delinquent taxpayer's unrestricted right to withdraw funds from a bank account constitutes "property" or "rights to property" subject to IRS levy, regardless of the fact that there may exist other claims to the funds on deposit and that the question of ultimate ownership may thus be unresolved. In *United States* v. *Sterling National Bank*, 494 F.2d 919 (2d Cir. 1974), a bank contended that its depositor had no "property [or] rights to property" in a checking account because the bank had an unexercised right of setoff (494 F.2d at 921). After consulting relevant state law, the Second Circuit (*id.* at 922) rejected this argument:

> Under any realistic definition of "property" the full amount in [the delinquent taxpayer's] account was his property or his right to property. Until the bank acted to restrict his right to draw on the funds, [the taxpayer] was entitled to write checks up to the full amount in the account. * * * * * At any time up to when the IRS served its notice of levy, [the taxpayer] could have written a check payable to the IRS for the balance of his account. Here the IRS was asserting no right to the funds in the checking account that [the taxpayer] did not already have.

The Second Circuit accordingly held that "all the funds in [the delinquent taxpayer's] checking account were his property" and hence were subject to levy in satisfaction of his taxes (*ibid.*). The same result has been reached, for substantially similar

reasons, by the Fifth [17] and the Ninth Circuits,[18] by numerous district courts,[19] and by the IRS in its published rulings.[20]

---

[17] See *United States* v. *Citizens & Southern National Bank*, 538 F.2d at 1105-1107 (delinquent taxpayer had "property [or] rights to property" in bank account where bank's right of setoff was unexercised and the taxpayer "was permitted to withdraw from his account"); *Citizens & Peoples National Bank* v. *United States*, 570 F.2d 1279, 1282-1284 (5th Cir. 1978) (same, where bank had received checks drawn on delinquent taxpayer's account but had not yet decided whether to pay them).

[18] See *Babb* v. *Schmidt*, 496 F.2d 957, 958-960 (9th Cir. 1974) (delinquent taxpayer had "property [or] rights to property" up to full value of joint bank accounts under state community property law); *Bank of Nevada* v. *United States*, 251 F.2d 820, 824-826 (9th Cir. 1957), cert. denied, 356 U.S. 938 (1958) (delinquent taxpayer had "property [or] rights to property" in bank account where bank's right of setoff was "inchoate" and "contingent"); *United States* v. *First National Bank*, 348 F. Supp. 388, 389 (D. Ariz. 1970), aff'd per curiam, 458 F.2d 513 (9th Cir. 1972) (same, where bank's right of setoff was unexercised and the taxpayer was "free to withdraw from his account").

[19] See *United States* v. *Equitable Trust Co.*, 49 A.F.T.R.2d (P-H) ¶ 82-428 (D. Md. 1982) (delinquent taxpayer had "property [or] rights to property" up to full value of joint checking account where he had "the absolute right to use or withdraw the entire fund"); *Sebel* v. *Lytton Savings & Loan Ass'n*, 65-1 U.S. Tax Cas. (CCH) ¶ 9343 (S.D. Cal. 1965) (delinquent taxpayer had "property [or] rights to property" up to full value of joint savings account where each co-depositor "was entitled to the whole of said account"); *Tyson* v. *United States*, 63-1 U.S. Tax Cas. (CCH) ¶ 9300 (D. Mass. 1962) (same, where "either depositor could withdraw all of the funds in the account"); *United States* v. *Third National Bank & Trust Co.*, 111 F. Supp. 152, 155-156 (M.D. Pa. 1953) (same).

[20] *E.g.*, Rev. Rul. 79-38, 1979-1 C.B. 406, 407 (delinquent taxpayer has "property [or] rights to property" in uncollected

This substantial body of judicial authority, rejected by the court of appeals below, is firmly supported by common sense. It is well established that the IRS in a levy proceeding "'steps into the taxpayer's shoes.'" *Rodgers*, 461 U.S. at 691 n.16 (quoting 4 Bittker, *supra*, ¶ 111.5.4, at 111-102); M. Saltzman, *supra*, ¶ 14.08, at 14-32. The IRS, in other words, acquires whatever rights the taxpayer himself possesses.[21] Since Roy had the right to withdraw the outstanding balance in each bank account and use it to pay his taxes, the IRS, by virtue of the levy, sought to do on his behalf exactly what he could have done of his own volition. In such circumstances, where a bank depositor under state law has the unrestricted right to withdraw funds from the account, "it is inconceivable that Congress * * * intended to prohibit the Government from levying on that which is plainly accessible to the delinquent taxpayer-depositor." *United States* v. *First National Bank*, 348 F. Supp. 388, 389 (D. Ariz. 1970), aff'd per curiam, 458 F.2d 513 (9th Cir. 1972). Accord, *United States* v. *Citizens & Southern National Bank*, 538 F.2d at 1107.

---

funds where, "by custom or agreement between the bank and the customer, the customer has a legal, fixed right to draw against [such] funds").

[21] See, *e.g.*, *St. Louis Union Trust Co.*, 617 F.2d at 1302 ("The IRS acquired the same right to receive and spend the entire amount of the [trust] income that [the taxpayer] had at the time the tax lien arose"); S. Rep. 1708, 89th Cong., 2d Sess. 19 (1966) ("[T]he effect of honoring the levy is the same as honoring a demand of the taxpayer.").

C. The Justifications Advanced by the Court of Appeals Do Not Support Its Decision to Remit the IRS to Only Those Remedies That an Ordinary Creditor Would Have Under State Law

The Eighth Circuit's decision in this case is the only recent appellate decision to sustain a bank's refusal to honor an IRS levy in circumstances like those here.[22] The court adduced three principal justifica-

---

[22] As noted in our petition (at 18 n.12), the only appellate authority even arguably supporting the court of appeals' result is *United States* v. *Stock Yards Bank*, 231 F.2d 628 (6th Cir. 1956). The Sixth Circuit there ruled that the IRS could not levy on United States savings bonds held in the names of a husband and wife to satisfy the former's tax liability, reasoning that "[p]roof of the actual value of the taxpayer's interest was an essential element of the government's case" (231 F.2d at 631). The *Stock Yards Bank* decision, however, involved a significantly different legal and factual environment than that involved in this case. The Sixth Circuit emphasized that the form of co-ownership in which the United States savings bonds were held was not a joint tenancy but "rather [was] an estate the limitations and conditions of which are delineated by the terms of the contract and by federal law" (*id.* at 630). The applicable federal regulations provided that "if a debtor * * * is not the sole owner of the bond, *payment will be made only to the extent of his interest therein*, which must be determined by the court or otherwise validly established" (31 C.F.R. 315.13 (1955) (quoted in 231 F.2d at 631) (emphasis added by the court of appeals)). In *Stock Yards Bank*, therefore, other, more particularized provisions of federal law placed a gloss on the term "property [or] rights to property" as generally used in Section 6331(a); the provisions of Arkansas garnishment law, obviously, can impose no such gloss on that term here. As the court below recognized (Pet. App. 10a n.6), moreover, *Stock Yards Bank* was decided before the enactment (in 1966) of Code Section 7426, which permits third parties claiming an interest in seized property to bring "wrongful levy" actions against the government. See pages 32-34, 37-38, *infra*. In sum, while we think that the Sixth Cir-

tions to support its result. First, it believed that result to be required by the provisions of Arkansas law governing the rights of creditors generally. Second, it reasoned that the bank had a defense because Ruby and Neva might have competing claims to part or all of the funds on deposit. Third, and more generally, it suggested that "levy is not normally intended for use as against property * * * bearing on its face the names of third parties, and in which those parties likely have a property interest" (Pet. App. 17a). There is no merit to any of these theories.

1. In holding that Roy did not possess "property [or] rights to property" on which the IRS could levy, the court of appeals relied heavily on Arkansas creditors' rights law. It rejected the government's contention that the IRS in a levy proceeding "would stand in Roy's shoes and could do anything Roy could do," reasoning that, "at least as to ordinary creditors, [that] is not the law of Arkansas" (Pet. App. 7a). Under Arkansas garnishment law, as construed by that State's courts, a creditor of a bank co-depositor is not "subrogated to that co-owner's power to withdraw the entire account" (*ibid.*, citing *Hayden* v. *Gardner*, 238 Ark. 351, 381 S.W. 2d 752 (1964)). Rather, a creditor in an Arkansas garnishment proceeding must "join both co-owners as defendants" and permit them to "show by parol or otherwise the extent of [their] interest in the account" (Pet. App. 7a). The court of appeals believed that a similar rule should apply in federal tax collection cases involving joint bank accounts. It accordingly concluded (*id.* at

---

cuit reached the right result on the facts presented in *Stock Yards Bank*, we disagree with much of that court's reasoning and believe that the case should be confined to the narrow situation there involved.

17a) that the government may not effectively levy on such accounts but must bring a Section 7403 action to foreclose its tax lien, joining all co-depositors as defendants.

This reasoning seriously misconceives the role properly played by state law in federal tax collection matters. As noted above (at 18-21), this Court has repeatedly held that state law is relevant only in "determining the *nature of the legal interest* which the taxpayer ha[s] in the property . . . sought to be reached" by the federal taxing statute. *Aquilino*, 363 U.S. at 513 (emphasis added; original quotation marks omitted). Once the nature of the taxpayer's legal interest is defined, the question whether that interest constitutes "property" or "rights to property," as those terms are used in Sections 6321 and 6331, is a question of federal law. *Bess*, 357 U.S. at 56-57; *J.A. Wynne Co.*, 641 F.2d at 208; *Randall*, 542 F.2d at 272-273; *United States* v. *Citizens & Southern National Bank*, 538 F.2d at 1105; *Fidelity & Deposit Co.*, 241 F.2d at 144; W. Plumb, *Federal Tax Liens*, *supra*, at 27; M. Saltzman, *supra*, ¶ 14.08, at 14-34; Note, *supra*, 77 Harv. L. Rev. at 1486-1487. The fact that under state law ordinary creditors may be unable to reach the full value of the taxpayer's legal interest, therefore, does not determine whether that interest constitutes "property [or] rights to property" within the meaning of Section 6331(a). In *Bess*, this Court held it irrelevant that "under state law the [taxpayer's] property right * * * was not subject to creditors' liens," ruling that, "once it has been determined that state law creates sufficient interests in the [taxpayer] to satisfy the requirements

of [the predecessor of Section 6321], state law is inoperative" (357 U.S. at 56-57 (citations omitted)).[23]

Contrary to the court of appeals' conclusion, therefore, the facts that under Arkansas law Roy's creditors (unlike Roy himself) could not exercise his right of withdrawal in their favor (Pet. App. 7a) and would have to join his co-depositors in a garnishment proceeding (*ibid.*) are irrelevant in answering the question presented here. The federal statute, after all, refers to *the taxpayer's* property and rights to property, not to his creditor's rights. Yet the court of appeals has effectively deprived the federal levy statute of all independent force, by remitting the IRS to only the rights that an ordinary creditor of the taxpayer would have under state law. That result is plainly wrong, for it is to "compare the government to a class of creditors to which it is superior" (*Randall*, 542 F.2d at 274 n.8).

---

[23] The Court in *Bess* observed that state creditors' rights laws "are not laws for the United States * * * unless they have been made such by Congress itself" and that "[t]he provisions of the Internal Revenue Act creating liens upon taxpayer's property for unpaid taxes * * * do not specifically provide for recognition of such state laws" (357 U.S. at 57 (original quotation marks omitted)). Congress has similarly provided that the Code's exemptions from the levy power are exclusive (I.R.C. § 6334(c)) and that "[p]rovisions of State law cannot grant an exemption from levy." S. Rep. 1622, *supra*, at 578. These well-established propositions reflect the more general principle that "[t]he exertion of [the federal taxing] power is not subject to state control" and that "[s]tate law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law." *Burnet* v. *Harmel*, 287 U.S. 103, 110 (1932). See *Springer* v. *United States*, 102 U.S. 586, 594 (1881).

Here, as in *Bess*, Roy had the unqualified right under state law to compel the bank to pay him the full outstanding balance in each account. That right belonging to Roy constituted "property [or] rights to property" within the meaning of Section 6331(a). The court of appeals erred in concluding that the restrictions imposed by Arkansas garnishment law on creditors generally could alter that result.

2. As a second justification for declining to impose personal liability on the bank, the court of appeals suggested that a custodian of property may "assert[], as a defense to a Section 6332 action to enforce the levy, that someone other than the taxpayer ha[s] an interest in the property" (Pet. App. 13a). The court noted that Ruby and Neva were nominal co-owners of the accounts and that their "rights [might] be affected if the levy [were] honored" (*id.* at 10a). It was thus proper for the bank, in the Eighth Circuit's view, to refuse to comply with the levy "until the rights of the various parties have been determined" (*id.* at 17a). A contrary rule, the court said, "might expose the bank to double liability"—once to the IRS, and possibly again "after being sued by Ruby or Neva" (*id.* at 15a).

This reasoning is spurious. To begin with, the courts have uniformly held that a person served with a notice of levy has two—and only two—possible defenses for failure to comply with the demand: (1) that he is not in possession of the taxpayer's property, and (2) that the property is subject to a prior judicial attachment or execution. *E.g.*, *United States* v. *Sterling National Bank*, 494 F.2d at 921; *Bank of Nevada* v. *United States*, 251 F.2d at 824; *Commonwealth Bank* v. *United States*, 115 F.2d at 330-331. See M. Saltzman, *supra*, ¶ 14.16, at 14-80. The fact

that other parties may have competing claims to the property is not one of these defenses.[24] Indeed, a custodian of property must honor an IRS levy even if he *himself* asserts a claim superior to the government's tax lien. 4 Bittker, *supra*, ¶ 111.5.5, at 111-110. This is because administrative levy "is only a provisional remedy" (*id.* at 111-108). "[T]he final judgment in [a levy] action settles no rights in the property subject to seizure" (*United States* v. *New England Merchants National Bank*, 465 F. Supp. 83, 87 (D. Mass. 1979)), and does not determine "whether the government's rights to the seized property are superior to those of other claimants." 4 Bittker, *supra*, ¶ 111.5.5, at 111-108.

This is not to say, of course, that the rights of other claimants are ignored under the Internal Revenue Code. In enacting the Code's summary collection

[24] See, *e.g.*, *J.A. Wynne Co.*, 641 F.2d at 207 (general contractor required to honor levy on funds due subcontractor notwithstanding "possible claims [to the funds] by * * * sub-subcontractors"); *United States* v. *Sterling National Bank*, 494 F.2d at 921 (bank required to honor levy on funds due depositor notwithstanding bank's claimed right of setoff); *DiEdwardo* v. *First National Bank*, 442 F. Supp. 499, 500 (E.D. Pa. 1977) (bank required to honor levy on funds due alleged nominee of taxpayer notwithstanding former's possible claim to the funds); *Determan* v. *Jenkins*, 111 F. Supp. 604, 605 (N.D. Ga. 1953) (police chief required to honor levy on currency taken from decedent "even though [he] knew at the time that [another party] was claiming the same"). It is accordingly well established that the IRS "has no duty to give notice to possible third party claimants or to search for them as a condition to enforcement of the levy." *Dieckman* v. *United States*, 550 F.2d 622, 624 (10th Cir. 1977) (per curiam). Accord, *e.g.*, *Douglas* v. *United States*, 562 F. Supp. 593, 596-597 (S.D. Ga. 1983), aff'd, 723 F.2d 919 (11th Cir. 1983).

procedures, Congress fully recognized that the IRS would occasionally levy in error, and that, "where the Government levies on property which, in part at least, a third person considers to be his, he is entitled to have his case heard in court." S. Rep. 1708, 89th Cong., 2d Sess. 29 (1966). Congress accordingly provided in Section 7426 of the Code that a person claiming an interest in property seized for another's taxes may bring a "wrongful levy" action against the United States to have the property (or the proceeds of its sale) returned.[25] Congress likewise provided, in Section 6343(b), that an aggrieved claimant may file, before proceeding to court, an administrative request for return of the property at issue. See Treas. Reg. § 301.6343-1(b)(2). This Court has repeatedly sustained the constitutionality of this post-seizure hearing procedure, reasoning that "[p]roperty rights must yield provisionally to governmental need" (*Phillips*, 283 U.S. at 595) because "the very existence of government depends upon the prompt collection of the revenues" (*G.M. Leasing Corp.*, 429 U.S. at 352 n.18).

In its solicitude for the potential claims of Roy's co-depositors, the court of appeals has ignored the statutory scheme that Congress established. Con-

[25] Section 7426(a) provides that any person (other than the taxpayer himself) who claims an interest in or lien on property and who claims "that such property was wrongfully levied upon may bring a civil action against the United States in a [federal] district court." The word "wrongful" as used in Section 7426(a) refers not to intentional wrongdoing on the government's part, but rather "refers to a proceeding against property which is not the taxpayer's." S. Rep. 1708, *supra*, at 30. If the taxpayer himself seeks relief from an allegedly wrongful levy, his proper avenue of redress is to file a refund suit under Section 7422.

gress determined that the interests of the government in the speedy collection of taxes and the interests of other claimants to the delinquent taxpayer's property are best reconciled by permitting the IRS to levy on the taxpayer's assets at once, leaving ownership disputes to be resolved in a post-seizure administrative or judicial hearing. Indeed, the courts repeatedly have held that, "[w]hen someone other than the taxpayer claims an interest in property or rights to property which the United States has levied upon, his exclusive remedy against the United States is a wrongful levy action under I.R.C. § 7426." *United Sand & Gravel Contractors, Inc.*, 624 F.2d at 739.[26] The court below erred in concluding that the validity of such third-party claims must be finally resolved—indeed, that the mere possibility of their arising must be anticipated and eliminated—before compliance with a levy can be required. In effect, the court created a third defense for failure to honor a levy, a defense not authorized by the language or policy of Section 6332.

Similarly, there is no merit to the court of appeals' suggestion (Pet. App. 14a-16a) that the bank could

[26] Accord, *e.g.*, *Valley Finance, Inc.* v. *United States*, 629 F.2d 162, 170-171 (D.C. Cir. 1980), cert. denied, 451 U.S. 1018 (1981) ("[a]s a third party challenging the government's [levy, the plaintiff's] proper avenue of redress is in the District Court under section 7426"); *Douglas* v. *United States*, 562 F. Supp. at 594 (where "[t]he essence of the plaintiff's case is that the IRS wrongfully levied upon her property in order to satisfy [someone else's] tax liability * * * the claimant's exclusive remedy is a wrongful-levy action under [I.R.C.] § 7426"); *DiEdwardo* v. *First National Bank*, 442 F. Supp. at 500 (holding that competing claimants' proper course was a Section 7426 suit in which they "may contest their designation as nominees and all other questions may be resolved").

refuse to comply with the levy because to comply "might expose [it] to double liability." To begin with, the statute admits of no such defense.[27] And even if the statute did permit such a defense, the bank could not qualify for it here. As noted above (at 14), a person who honors an IRS levy is "discharged from any obligation or liability to the delinquent taxpayer with respect to [the] property or rights to property" surrendered (I.R.C. § 6332(d)). Although no provision of the Code would explicitly immunize the bank from suits by Roy's co-depositors, the Code does provide a federal administrative remedy (I.R.C. § 6343(b)) and a federal judicial remedy (I.R.C. § 7426) to third parties who believe that their property has been wrongfully seized for another's taxes. See pages 32-34, *supra*. Since federal remedies would be available to Ruby and Neva, it is highly questionable whether the bank, consistently with established preemption principles, could be held liable under state law in an action by Roy's co-depositors for complying with an IRS levy, if (as here) the state would not have imposed liability on the bank for permitting Roy himself to withdraw the funds. Cf. *Nash* v. *Florida Industrial Comm'n*, 389 U.S. 235 (1967).

In any event, the bank would have a complete defense under state law to any such action by Roy's co-depositors. Arkansas law provides that a bank's payment to any one depositor constitutes "a valid and sufficient release and discharge of said bank" from co-depositors' claims, absent written notice from them

[27] See, *e.g.*, *United States* v. *Capital Savings Ass'n*, 576 F. Supp. 790 (N.D. Ind. 1983), on appeal, No. 84-2961 (7th Cir. 1984); *United States* v. *Third National Bank*, 111 F. Supp. at 156.

not to pay.[28] Ark. Stat. Ann. §§ 67-521, 67-552(h) (1980) (*reprinted in* Pet. App. 37a-38a). Since the government stands in the shoes of the delinquent taxpayer when levying on a joint bank account, the bank's payment to the IRS in effect would be a constructive payment to Roy, and hence would likewise insulate the bank from actions by Ruby or Neva. See, *e.g.*, *United States* v. *Bowery Savings Bank*, 297 F.2d 380 (2d Cir. 1961); *DiEdwardo* v. *First National Bank*, 442 F. Supp. at 499-500; *Sebel* v. *Lytton Savings & Loan Ass'n*, 65-1 U.S. Tax Cas. (CCH) ¶ 9343 (S.D. Cal. 1965); *Determan* v. *Jenkins*, 111 F. Supp. at 605; *Wechsler* v. *Home Savings & Loan Ass'n*, 57 Cal. App. 3d 563, 129 Cal. Rptr. 380 (1976).

3. As a final justification for refusing to impose personal liability on the bank, the court of appeals theorized that an IRS levy "is not normally intended for use as against property in which third parties have an interest" or "as against property bearing on its face the names of third parties" (Pet. App. 17a). The court appeared to recognize that Congress's enactment of Section 7426—which permits wrongful-levy actions by "any person * * * who claims an interest in" seized property—tended to undermine this theory. But the court suggested that the Section 7426 remedy is designed to protect only those third parties

[28] The bank has never suggested that such written instructions from Roy's co-depositors existed here (see pages 22-23 & note 16, *supra*). In circumstances where a bank had received such instructions before the notice of levy was served, it could file an interpleader action under 28 U.S.C. 2410. That Section permits the United States to "be named a party in any civil action * * * of interpleader * * * with respect to * * property on which the United States has or claims a * * * lien."

"whose property has been seized 'inadvertently'" (Pet. App. 17a). Here, the court noted, the joint bank accounts bore on their face the names of Roy's co-depositors, so that the government's attempt to seize their property, in the court of appeals' view, was "not at all inadvertent" (*ibid.*).

This rationale, too, is erroneous. To start with, the collection provisions of the Code plainly contemplate that a taxpayer's interest in property may be less than fee ownership. The federal tax lien attaches, not only to the taxpayer's "property," but also to his "rights to property," and the lien may be enforced by levy against such "rights." I.R.C. §§ 6321, 6331. Thus, the fact that a taxpayer is not the sole owner of property does not insulate his interest, however limited, from federal tax collection procedures. In enacting Section 7426, moreover, Congress said that the wrongful-levy remedy was intended to be available whenever the IRS levies "on property which, *in part at least*, a third person considers to be his" (S. Rep. 1708, *supra*, at 29 (emphasis added)). This language makes clear that Congress envisioned levies on jointly-owned or co-owned property.

Nor is there merit to the Eighth Circuit's notion that the Section 7426 remedy is confined to situations where the IRS acts "inadvertently," by which the court seemed to mean "without notice that potentially competing claims exist." The wording of Section 7426 —which permits suit by "any person" who claims an interest in seized property—surely provides no basis for distinguishing among various species of third-party claimants. The legislative history of the Section likewise provides no basis for such a distinction, for it defines a "wrongful levy" quite simply as "a proceeding against property which is not the taxpay-

er's" (S. Rep. 1708, *supra*, at 30). And the result produced by the Eighth Circuit's suggested reading would be anomalous, for it would leave third-party claimants without recourse where the seizure is "advertent," that is, where the IRS arguably has notice of their potentially competing claims. Indeed, if the bank in this case had honored the levy, Ruby and Neva on the court of appeals' theory would be unable to vindicate in court whatever interest they might have in the funds on deposit. Surely Congress did not intend that Section 7426, a remedial statute, should be construed in so whimsical a manner, or that the government should be able "with impunity [to] seize property of innocent third parties by levy procedures" provided only that it knows about their claims ahead of time. *Al-Kim, Inc.* v. *United States*, 610 F.2d 576, 580 (9th Cir. 1979).

This Court's decision in *United States* v. *Rodgers*, *supra*, contrary to the court of appeals' conclusion (Pet. App. 16a-17a), does not support its reasoning on this score. The question in *Rodgers* was whether Section 7403—which authorizes the government (see page 13, *supra*) to bring plenary judicial actions to foreclose its tax liens—empowers a district court to order the sale of a family home in which a delinquent taxpayer has an interest, but in which the taxpayer's nondelinquent spouse also has a homestead interest under state law. This Court held that sale of the entire property, and not merely of the delinquent taxpayer's interest in the property, is permitted, provided that the non-delinquent spouse is compensated out of the sale proceeds for his or her homestead stake (461 U.S. at 698-700). In so ruling, the Court compared Section 7403's operation with that of Section 6331, noting (461 U.S. at 696) that "Section 6331,

unlike § 7403, does not require notice and hearing for third parties, because no rights of third parties are intended to be implicated by § 6331."

The court of appeals below read this passage from *Rodgers* to "impl[y] that levy is not normally intended for use * * * against property bearing on its face the names of third parties, and in which those parties likely have a property interest" (Pet. App. 17a). But the *Rodgers* opinion contains no such implication. The Court in *Rodgers* correctly pointed out that Section 6331 does not "implicate the rights of third parties" because an administrative levy, unlike a judicial lien-foreclosure action, does not determine ultimate ownership rights where such rights are in dispute. See pages 15-16 & 32, *supra*. Rather, Congress has provided that third parties' competing claims to property levied upon will be resolved *after* the levy is made, in a post-seizure administrative or judicial hearing. See *Rodgers*, 461 U.S. at 696 (citing I.R.C. §§ 6343(b) and 7426); pages 32-34, *supra*. Nothing in *Rodgers* suggests that this Court would invalidate an IRS levy on a bank account—where (as here) the delinquent taxpayer has the unrestricted right to obtain the full outstanding balance at any time without notice to his co-depositors—merely because the account "bear[s] on its face the names of third parties."

Indeed, in *G.M. Leasing Corp.*, *supra*, this Court specifically upheld the validity of an IRS levy on property bearing on its face the name of a third party—a straw man found to be the delinquent taxpayer's alter ego (429 U.S. at 350-351). The lower courts have repeatedly sustained levies in a variety of similar circumstances. See, *e.g.*, *Valley Finance, Inc.*, 629

F.2d at 165 (alter ego of taxpayer); *Babb* v. *Schmidt*, 496 F.2d at 958-960 (co-depositor of taxpayer); *James E. Edwards Family Trust* v. *United States*, 572 F. Supp. 22 (E.D.N.M. 1983) (trust found to be a nullity); *DiEdwardo* v. *First National Bank*, 442 F. Supp. at 499-500 (nominee of taxpayer); *United States* v. *Equitable Trust Co.*, 49 A.F.T.R.2d (P-H) ¶ 82-428 (D. Md. 1982) (co-depositor of taxpayer); *Sebel*, 65-1 U.S. Tax Cas. (CCH) ¶ 9343 (same). As explained more fully below (see pages 40-44, *infra*), the IRS serves several hundred thousand notices of levy on joint bank accounts every year, and it has levied on various types of jointly-held property for many decades. This consistent pattern of administrative interpretation is entitled to considerable deference, and it points up the fallacy of the court of appeals' notion that levies are "not normally intended for use" (Pet. App. 17a) against such property.

D. The Court of Appeals' Decision Would Pose a Serious Threat to the Federal Tax Collection Process

In holding that a bank may refuse to honor an IRS levy on accounts in which third parties have an interest, the decision below would seriously impair the government's ability to collect taxes. It would impose burdens of staggering dimension not only on the IRS and the federal courts, but on the banking system and taxpayers themselves. Indeed, the Eighth Circuit's ruling would effectively preclude administrative levies whenever a taxpayer's property is titled in joint names.

Administrative levies are the Commissioner's primary tool for the collection of delinquent taxes. During the past three and a half years, the IRS has served nearly five million notices of levy, principally

on employers and banks.[29] The chief advantage of administrative levies is their nonjudicial nature, a characteristic that renders the collection process both expeditious and inexpensive. See page 16, *supra*. Although a levy does not determine ultimate ownership rights where such rights are in dispute, it does protect the government "against diversion, loss, or concealment of the property" in the interim. 4 Bittker, *supra*, ¶ 111.5.5, at 111-108.

It is common knowledge that American taxpayers frequently hold financial assets, particularly bank accounts, in joint names. Indeed, during the past three and a half years, the IRS has served notices of levy on some 800,000 joint bank accounts.[30] The IRS estimates that, in about half these cases, the account was held in the names of a delinquent taxpayer and a "third party"—*i.e.*, a party who did not share liability for the tax delinquency—the levy being predicated on the delinquent taxpayer's right unilaterally to withdraw the entire balance. Very few of these cases resulted in litigation, be it an enforcement action by the Commissioner or a wrongful levy action by the co-depositor. Rather, the bank simply paid the funds to the IRS, the taxpayer acquiesced, the co-depositor raised no objection, and no one ever went to court.

---

[29] The IRS has provided us with the following breakdown of levies served during fiscal 1981-1984:

	Total Levies	Levies On Banks
FY 1981	740,103	308,622
FY 1982	1,058,452	441,374
FY 1983	1,390,900	580,005
FY 1984	1,484,000	600,000

[30] Statistics referred to in this brief are derived from IRS records and were provided to us by the Service.

On the court of appeals' theory, however, a bank can refuse with impunity to honor a levy on a joint account unless the IRS proves to the bank's satisfaction the proportionate "ownership interests" of the delinquent taxpayer and his various co-depositors. This would make administrative levies so burdensome as to be impractical whenever a delinquent taxpayer's property is titled in more than one name. The task of sorting out the potential claims inter sese of joint tenants is "an impossible burden to cast upon a party not privy to the confidential relationship normally existing between such co-owners." Plumb, *supra*, 77 Yale L.J. at 629. Under Arkansas law, for example, as the Eighth Circuit observed below, "[t]he rights of the co-owners *inter sese* * * * depend on the intention of whoever deposited the money, or on whatever agreement, if any, might have been made among them" (Pet. App. 6a-7a). Differentiating joint depositors' respective ownership interests "involves one of the murkiest areas of property law" (Plumb, 77 Yale L.J. at 629), typically entailing "[a] long series of deposits which cannot be traced to their source, and a similar series of withdrawals which cannot be traced to their destination." *Park Enterprises, Inc.* v. *Trach*, 233 Minn. 467, 471-472, 47 N.W.2d 194, 197 (1951). The decision below would invite self-serving affidavits by delinquent taxpayers and their co-depositors, all of whom will typically be related, if not by blood, by friendship or commercial ties. Quite obviously, proving the respective "ownership interests" of such co-depositors is a burden that the IRS, at the administrative levy stage, would not find easy —indeed, would typically find impossible—to bear.[31]

[31] Even in state garnishment proceedings, the courts have recognized the virtual impossibility of requiring a creditor to prove how much of a joint bank account is "owned" by one of the co-depositors. In *Park Enterprises, Inc., supra,* for example, the Minnesota Supreme Court held that a creditor could garnish the full amount on deposit in a joint account for the individual debt of one co-depositor, reasoning that "courts should not encourage parties to do their bookkeeping in court when, by virtue of their private contract, they have virtually declared that they do not wish to be inconvenienced by strict accountability as between themselves" (233 Minn. at 471-472, 47 N.W.2d at 197). Similarly, in a decision relied on by the Eighth Circuit below (Pet. App. 7a), the Arkansas Supreme Court held that all the funds in a joint account "are prima facie subject to garnishment," with the burden being placed on the nondelinquent co-depositor "to show what portion of the funds he or she actually owned." *Hayden* v. *Gardner*, 238 Ark. 351, 354, 381 S.W. 2d 752, 754 (1964). The Arkansas court reasoned that the co-depositor should bear the burden of proof because he would be "in a much better position than the judgment creditor to know the pertinent facts" (238 Ark. at 354, 381 S.W. 2d at 754). Ironically, if the Eighth Circuit below had strictly followed the rationale of *Hayden,* it would have placed the burden of proof, not on the IRS, but on the bank, which was indirectly asserting Ruby's and Neva's claims. See *Flores* v. *United States*, 551 F.2d 1169, 1174 (9th Cir. 1977) (reasoning that it is appropriate for the person in possession of property "to carry the burden of showing non-ownership by the taxpayer as a defense because the purpose of the statute is a coercive one which seeks to foster swift tender of property which has been levied upon"). Accord, *United States* v. *Montchanin Mills, Inc.*, 512 F. Supp. 1192, 1195 (D. Del. 1981); Rev. Rul. 55-187, 1955-1 C.B. 97. The more practical solution, however, is the one that Congress in fact adopted: the immediate securing of the funds by IRS levy, with a subsequent opportunity for competing claimants to assert and prove their claims in a post-seizure administrative or judicial hearing. See pages 32-34, *supra.*

Faced with the difficulty of resolving ownership disputes administratively, the IRS, if it wished to pursue a delinquent taxpayer's interest in a joint bank

account, would have no practical alternative but to follow the Eighth Circuit's suggestion (Pet. App. 17a) and bring a lien-foreclosure suit under Section 7403, joining all co-depositors as defendants. But this would place an enormous burden on the Commissioner and on the courts. As noted above, the IRS in the past three and a half years has served notices of levy on some 400,000 joint bank accounts titled in the names of a delinquent taxpayer and a "third party." The Service estimates that slightly more than half of these cases—200,000 or more—would have involved sufficient tax liabilities to justify the time and expense of litigation. This number of additional cases would cost the government tens of millions of dollars to litigate and would impose a tremendous strain on the federal courts, not to mention the Nation's banks. The fiscal impact would be aggravated by the delay in collecting hundreds of millions of dollars in revenues while the litigation was pending, as well as by the risk that the bank accounts would be depleted in the interim.[32]

Given the prohibitive cost of litigating over levies on joint bank accounts, the Commissioner would be forced by the decision below to consider other collection measures, such as seizures of delinquent taxpayers' houses, cars, and other tangible property. At present, the IRS generally tries to collect unpaid taxes by levies on intangible assets rather than by

[32] In these and other respects, as a leading commentator has noted, "the Government has a very real stake in preventing its less expensive and [less] time-consuming administrative remedy from being rendered impotent by its too-frequent abandonment in the face of what it believes to be frivolous competing claims." W. Plumb, *Federal Tax Liens, supra,* at 256.

seizure of tangible property—a preference explained by the fact that seizure and sale of tangible property involve a slow and drawn-out process, often burdensome to the taxpayer, invariably costly for the IRS, and usually unpleasant for all concerned.[33] Under the decision below, however, the Commissioner would have no alternative but to take more collection action against physical property.

Finally, the decision below would provide tax protestors and other tax evaders with a new and effective means to delay or defeat collection of the tax. Some 37,000 illegal protest returns were filed in fiscal 1983, a six-fold increase over the comparable figure for 1978. Tax protestors could take advantage of the Eighth Circuit's decision simply by adding extra names—accommodating relatives, or other tax protestors—to their bank accounts. This might be all that would be necessary to immunize relatively small accounts from enforced collection, since the IRS would not likely find it profitable to litigate such cases. Alternatively, a taxpayer with a delinquent tax liability might attempt to "launder" deposits to a joint account through a "third party" co-depositor, hoping that the Commissioner would be unable to prove which money was whose. Although such schemes can be exposed, the attendant costs are large. And, significantly, tax protestors might well rely on the decision below to bring suits against banks that continue to honor—correctly, in our view—IRS levies

[33] During fiscal 1983, for example, the IRS served 1,390,900 notices of levy and executed only 15,554 seizures—a ratio of about 100 to one. Seizures are far more expensive because they entail, *e.g.*, courthouse searches for prior liens, expenses of appraising and advertising the property, and costs of execution.

on joint accounts of the sort involved here. Although banks would almost certainly have valid defenses to such suits (see pages 35-36, *supra*), the expense of litigating even frivolous cases could be substantial.

In *Bull* v. *United States*, 295 U.S. 247, 259 (1935), this Court declared that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." The administrative levy system is a time-honored, congressionally-authorized collection technique designed to ensure that this need is equitably met. The decision below constitutes an unprecedented, unwarranted, and wholly impractical limitation on the right of the United States to collect its taxes in that way.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

WILLIAM S. ESTABROOK
JOHN A. DUDECK, JR.
Attorneys

FEBRUARY 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10179